condition that their deliberations are in accordance with the advice of their Executive Councils and in the company of the Yang di-Pertua-Yang di-Pertua Negeri and the Yang di-Pertuan Agong. But the Rulers take no decision in the matter. Article 131 specifically enables the Yang di-Pertuan Agong to make arrangements with Her Majesty the Queen of England for the reference of appeals to him to the Privy Council "in any case in which such an appeal is allowed by federal law." He may decide, as he did in this case, on the advice of his Cabinet, to abolish any or all appeals to himself. In all his functions, the Yang di-Pertuan Agong is not a Ruler within the meaning of a Ruler of a constitutional state of the Federation. When a Ruler becomes the Yang di-Pertuan Agong, he cannot hold at the same time his position of a Ruler but he is required to appoint a Regent. At the Conference of Rulers, the Regent attends as a Ruler, but the Yang di-Pertuan Agong is not entitled to attend as a Ruler and for this reason, he does not attend on the first day when the Rulers exercise the functions set out which lie within their discretion. Law and procedure therefore are matters which cannot come within the honours, etc. of the Rulers.

The case before us has been loaded with so much learning and marked by brilliance of exposition of all the constitutional points involved, that we do stand in danger of not seeing the wood for the trees, and if we get entangled in the branches of the trees, we may miss reaching the destination: the correct conclusion or decision which is whether Act A328 affects pending appeals. The Privy Council case in *Colonial Sugar Refinery Company Ltd.* v. *Irving*[1] which is cited to us has held that if the amending Act affects substantive rights, it will not apply to pending proceedings already commenced unless a clear intention to that effect is manifested. We have looked at subsection (4) of section 13 of Act A328. It reads: "The amendments embodied in this section shall not apply to any appeal or application for appeal which is pending at the date of the coming into force of this section." That subsection has been judicially interpreted in the Privy Council case in *Lee Chow Meng* v. *Public Prosecutor*[2] as follows: "The subsection makes it perfectly clear that the amendment in question, which deletes the right of appeal in criminal matters, applies to all cases except those in which an appeal or an application for appeal is pending at the date of coming into force, namely January 1, 1978." We cannot possibly cavil at the decision of the Privy Council in *Lee Chow Meng*, supra, or wish to criticize it. It is apparent that Act A328 does not affect pending appeals and the singular point before us is whether an appeal to the Privy Council is pending as on January 1, 1978. In our view pending appeal must undoubtedly mean an appeal properly brought within the meaning of the Judicial Committee Rules, 1957, in particular, rules 3 and 4. We are satisfied that as on that date no appeal was pending before the Privy Council. We would therefore dismiss the motion.

Motion dismissed.

Solicitors: *Jagjit Singh & Co.*

PUBLIC BANK BHD. v. PERBADANAN KEMAJUAN NEGERI SELANGOR

[F.C. (Raja Azlan Shah Ag. L.P., Chang Min Tat & Syed Othman F.JJ.) September 24 & October 18, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 133 of 1976]

Contract — Building Contract — Guarantee — Security deposit in form of Security guarantee by Bank — Liability of surety — Whether claim maintainable when liability of principal not ascertained — Contracts Act, 1950, s. 79.

This was an appeal from the decision of Mohamed Azmi J. ([1980] 1 M.L.J. 172). The respondent had claimed payment of the security deposit which had been given in the form of a security guarantee by the appellant bank, to secure the due performance of a building contract. The contractor had defaulted in performing the building contract. The principal argument at the appeal was that the security guarantee was inoperative until the full extent of the liability of the principal debtor had been ascertained.

Held: on a proper construction of the security guarantee, the appellant had promised to pay the security deposit which the contractor was required to pay as a condition precedent in the event of his default to perform the contract. When the contract was determined in accordance with its terms due to the default of the contractor, the security deposit required became payable.

FEDERAL COURT.

V.K. Palasuntharam (*Philip Choong Mun Chong* with him) for the appellants.

Mohamed Ismail bin Shariff for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal calls for the proper construction of a document executed by the appellant Bank on its own form in favour of the respondent. The document is in these words:

"Public Bank Berhad
Kuala Lumpur

12th October, 1972.

To: Perbadanan Kemajuan Negeri Selangor, Petaling Jaya.

Sir,

SECURITY GUARANTEE

As requested by the Contractor Beton Construction Co. Ltd., No. 8, Leboh Ampang, Kuala Lumpur, we hereby guarantee that the sum of $135,666 (Dollars One hundred thirty-five thousand six hundred and sixty-six only) being the amount of Security Deposit required for the due performance of the convenants of their contract with you re: construction of piled foundation and sub-structure of sub-basement and basement for 12 storey office cum Shopping Centre at Jalan Raja Laut Tambahan, Kuala Lumpur shall become payable by us in the event of the Contractor's failure to perform the said convenants.

This guarantee is effective from October 15, 1972 to January 15, 1974 or further to the actual completion date of the contract for which this guarantee is submitted if duly notified by your authorised representative and confirmed by us in writing countersigned by the Contractor and is conditional upon a claim thereunder being made by the original or any revised expiry date, as is duly notified by your authorised representative.

Yours faithfully,
for PUBLIC BANK BERHAD
Kuala Lumpur

Sgd. ? Manager Sgd. ? Accountant."

The appellant would stress the description of the document as a guarantee.

The allied question is the default of the contractor. The relevant terms of the building contract between

the respondent and Beton Construction Co. Ltd. (the contractor) which is in writing are the following:

"34. If the Contractor fails to complete the Works by the date in the Appendix or within any extended time under Clause 35 hereof and the Superintending Officer certifies in writing that in his opinion the same ought reasonably so to have been completed the Contractor shall pay or allow to Government a sum calculated at the rate stated in the Appendix as liquidated and ascertained damages for the period during which the said Works shall so remain or have remained incomplete and the Superintending Officer may deduct such damages from any moneys due to the Contractor."

This clause provides for the damages payable by the contractor in the event he fails to complete the construction.

Clause 37 provides for the determination of the contract in the event any of the defaults by the contractor specified and in its relevant parts reads:

"37. (a) Default — If the Contractor shall make default in any of the following namely:

(i) without reasonable cause wholly suspends the Works before completion;

(ii) fails to proceed with the works with reasonable diligence;

(iii) ....

then, if any such default shall continue for seven days after a notice sent by registered post to the Contractor from the Superintending Officer specifying the same, the Superintending Officer may without prejudice to any other rights herein contained thereupon by notice sent by registered post determine this Contract; provided that notice hereunder shall not be given unreasonably or vexatiously and such notice shall be void if Government is at the time of the notice in breach of this Contract.

(b) ....

(c) In either of the above cases the following shall apply namely:

(i) The Government may carry out and complete the Works departmentally or employ and pay a contractor or other person or persons to carry out and complete the Works....

(ii) ....

(iii) ....

(iv) Until completion of the Works under this clause no payment shall be made to the Contractor under this Contract; provided that, upon completion as aforesaid and the verification within a reasonable time of the accounts therefor, the Superintending Officer shall certify the amount of expenses properly incurred by Government; and if such amount added to the moneys paid to the Contractor before such determination exceeds the total amount which would have been payable on due completion the difference shall be a debt payable to Government by the Contractor; and if the said amount added to the said moneys be less than the said total amount the difference shall be a debt payable by Government to the Contractor.

(v) In the event of the completion of the Works being undertaken departmentally, allowance shall be made when ascertaining the amount to be certified as expenses properly incurred by Government, for the cost of supervision, interest and depreciation on plant and all other usual overhead charges and profit, as would be incurred were the work carried out by a contractor."

It is apparent that while Clause 37(a) provides for the steps to be taken by the respondent in the event of a default by the contractor, to determine the contract, sub-clause (c)(iv) provides for the taking of an account on the completion of the work by the respondent departmentally or through another contractor to ascertain whether the contractor owes the respondent money or vice versa and until such time all payments to the contractor are frozen. The freezing of such payments as for example progress payments under clause 41 due to the contractor in such an event will reduce the liability of the contractor who fails to complete, generally for financial reasons, and is for this reason of grave importance to the respondent.

For the same reason, the contractor was required as a condition precedent to make a security deposit. This requirement is expressed in clause 40 in the following terms:

"40. The Contractor shall, as a condition precedent to the commencement of any work under this Contract, deposit with Government, a cash amount or an approved banker's guarantee equal to five per cent of the Contract Sum as a fund (hereinafter referred to as the 'Security Deposit'). It is agreed that the Superintending Officer may utilize and make payments out of or deductions from the said Security Deposit in accordance with the terms of this Contract."

The contractor had the option of providing the security deposit which in this case amounts to some $135,666 in cash or by a banker's guarantee. The use to which this security deposit may be put is set out in the last sentence. As so set out, there is no reason to imagine that the Superintending Officer may not use it to pay for any defaults on the part of the contractor, if the words "in accordance with the terms of this contract" are to have any meaning. This is clarified, if such a necessity arises in clause 42(b) which reads:

"42& (b) The Security Deposit (or any balance thereof remaining for the credit of the Contractor) shall be released on the completion of the whole of the Works comprised in this Contract and shall be refunded immediately upon the giving of the certificate under sub-clause (d) of Clause 33 of this Contract."

Clause 33(d) refers to the determining of the Defects Liability Period and is of no relevance in this appeal.

Within 12 months of the commencing of the works, the contractor by letter dated July 7, 1973 advised the respondent of its inability to carry on with the works. The reason given was the rising costs of the materials. It no longer had the financial means to proceed. Inferentially it must see that to do so would involve it in a huge loss and it would be better to cut its losses at this stage. It therefore asked to be released from the contract.

Despite this notice of determination of the contract by the contractor, the respondent acted under clause 37(a) giving notice of determination for the declared failure to proceed with the works. The respondent also gave notice reserving all its rights under the contract or otherwise to claim or sue for damages for breach of contract by the contractor. This notice was given on July 25, 1973 after it had required, *ex abundanti cautela*, the contractor to carry out the works and the specified period of seven days had elapsed.

Two days later, the respondent required the appellant to honour the security guarantee and when the latter failed to do so, took out a writ. The defence relied on the alleged absence of any consideration for the security guarantee, next on alleged variations made to the contract, then on limitation and finally on the extent of the liability of the appellant which was said to be co-extensive with that of the contractor but limited to the amount stated in the guarantee. On the last ground, it was contended that the liability of the contractor had not been determined, in the failure of the Superintending Officer at all material times to

certify the amount properly incurred by the respondent under clause 37(c)(iv), *supra*.

The learned trial judge disposed of the contentions of the defence and gave judgment for the respondent. Before us, the appellant in a detailed memorandum of appeal contended that the judge was wrong in law and in fact. The main burden of the appeal consisted of, if we may so summarise it, without, we hope, injustice to the arguments of counsel, a full amplification of the last ground and was that the security guarantee was a guarantee within the meaning in section 79 of the Contracts Act, 1950 and therefore inapplicable (or inoperative) until the full extent of the liability had been determined. Counsel read us a large number of cases on the meaning and obligation of a guarantee. His list of authorities he would rely on gave many more.

Section 79 of the Contracts Act, 1950 reads:

"79. A 'contract of guarantee' is a contract to perform the promise or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."

Now apply this statutory definition to the security guarantee. The promise of the principal debtor, here the contractor, was to carry out the works in accordance with the terms of the contract. The appellant in the security guarantee had not in any way contracted to do so. The liability of the principal debtor is to pay on his failure to complete the works, the amount of the damages specified in clause 34 and the amount of the expenses properly incurred by the respondent in completing the works either departmentally or by other contractor or contractors in terms of clause 37(c) of the contract. The full extent of this amount the appellant had also not promised to pay. In consequence therefore, all those cases relied on by counsel for the appellant on the requirement of the determination of the liability of the contractor as the principal debtor before the surety could be called on to discharge it are, with respect, of no application.

Though the security guarantee does not appear to fit in with the definition in section 79 of a contract of guarantee, it is, nevertheless, a guarantee but only for the purpose and to the extent stated therein. It is axiomatic in the construction of documents that the intent of a particular document must be discerned from the words themselves used. The definition of this particular document as a security guarantee clearly denotes the extent of its effect. It is a guarantee for the payment of the security deposit mentioned in clause 40. The words speak plainly for the purpose in mind. On a proper construction, the appellant had promised to pay this security deposit which the contractor was required to pay as a condition precedent in the event of his default to perform his contract. When the contract was determined in accordance with its terms on the default of the contractor, the security deposit required became payable.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Kam Woon Wah & Co.; Zain & Co.*

MURTADZA BIN MOHAMED HASSAN v. CHONG SWEE PIAN

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Abdoolcader J.) April 3 & November 1, 1979]

[Penang — Federal Court Civil Appeal No. 213 of 1978]

Tort — Road Accident — Damages — Professional lorry driver — Special Damages — Loss of earnings from date of accident — Loss of future earnings — Normal age of retirement for man in respondent's state in life and state of health — Damages for pain and suffering and loss of amenities — Interest on damages awarded — Need to itemise award of damages.

Damages — Personal injuries — Multiple laceration — Linear fracture of left temporal bone — Injury resulting in physical disability and mental retardation.

Damages — Special damages — Loss of future earnings — Pain, suffering and loss of amenities — Interest — Need to itemise award of damages.

In this case the appellant admitted liability for the accident which caused the injuries to the respondent and the only issue was the amount of damages. The accident occurred on November 5, 1972 and judgment was given on November 23, 1978. The respondent suffered multiple lacerations and a linear fracture of the left temporal bone, as a result of which he was unconscious for five days. The injury resulted in physical disability and mental retardation. He lost his job as a lorry driver and has been unsuccessful in getting employment. The learned trial judge awarded $16,636.80 for special damages and a global sum of $45,000 for pain and suffering and loss of amenities and for loss of future earnings. Interest at 3% was awarded on the special damages and at 6% on the whole of the general damages. The appellant appealed.

Held: (1) the loss of earnings between the date of the accident and the date of trial constituted special damages, which could be recovered, if pleaded, as in this case, and therefore the award for special damages must be upheld;

(2) in the circumstances it must be assumed that the respondent's useful working life would usually have ended at 55 years and the sum for loss of future earnings should be reduced to $15,633;

(3) on general damages for pain and suffering and loss of amenities, the sum of $20,000 awarded by the learned trial judge was appropriate;

(4) interest at 3% would be awarded on the special damages from the date of accident to date of trial and at 6% on the general damages for pain and suffering and loss of amenities from date of service of the writ. No interest should be allowed for the damages for loss of future earnings.

[Editorial Note: Reference may also be made to our note "Damages — No interest on future loss" [1979] 1 M.L.J. xxv].

Cases referred to:-

(1) *Ilkiw* v. *Samuels & Ors.* [1963] 2 All E.R. 879.

(2) *Yee Hup Transport & Co. & Anor.* v. *Wong Kong* [1967] 2 M.L.J. 93.

(3) *Jefford* v. *Gee* [1970] 1 All E.R. 1202.

(4) *Cookson* v. *Knowles* [1977] 2 All E.R. 820.

(5) *Pickett* v. *British Rail Engineering Ltd.* [1978] 3 W.L.R. 955; [1979] 1 Ll. L.R. 519, 537.

(6) *Foong Nan* v. *Sagadevan* [1971] 2 M.L.J. 24.

FEDERAL COURT.

S. Thillaimuthu for the appellant.

R. Manecksha (*R. Rajasingam* with him) for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J.: Liability for the accident having been admitted, the only issue at the trial in the High Court at Penang (Gunn Chit Tuan J.) was the amount of the damages to be awarded.